



POLICE DEPARTMENT

January 12, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Angelina Sheehan
Tax Registry No. 924887
Staten Island Court Section
Disciplinary Case No. 2010-3030

The above-named member of the Department appeared before the Court on December 21, 2011, charged with the following:

1. Said Police Officer Angelina Sheehan, assigned to Staten Island Courts Section, on or about and between December 1, 2006 and May 28, 2010, failed to notify IAB regarding her testimony during two civil EBTs (Examinations Before Trial) taking place on December 1, 2006,¹ to wit: said Officer repeatedly asserted her Fifth Amendment privilege against self-incrimination in response to questions about her actions during and after her arrests of two civilians, and failed to notify IAB as to her assertions of that privilege in relation to those arrests. (*As amended*)

P.G. 207-21, Page 1-2, Paragraph 1-3 – COMPLAINTS – ALLEGATIONS OF
CORRUPTION AND SERIOUS
MISCONDUCT AGAINST MEMBERS
OF THE SERVICE

The Department was represented by Rudolph Behrmann, Esq., Department Advocate's Office, and Respondent was represented by John Tynan, Esq.

Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

¹ Orally amended on day of trial to remove date of March 29, 2007.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department presented in evidence, as Department's Exhibit [DX] 1, a transcript of the Examination Before Trial (hereinafter referred to as the deposition) of Respondent conducted on December 1, 2006 and March 29, 2007.

Respondent's Case

Respondent testified in her own behalf.

Respondent

Respondent was appointed to the Department on March 1, 2000. After completing the Police Academy she was assigned to the 63 Precinct. In 2004, she was transferred to the Staten Island Court Section where she is currently assigned.

On December 1, 2006 she was notified to appear at a deposition. She was told she would be questioned about an arrest that had occurred in 2002. She did not have a recollection of that arrest.

On direct examination, when asked what the city attorney told her, Respondent stated: "To answer questions to your – to the best of knowledge (as in transcript) and to tell the truth of what happened." When asked what that attorney told her to do if she did not know the answer to a question, Respondent replied: "He advised me to plead the

Fifth Amendment.” When asked what that attorney meant by “plead the Fifth Amendment,” Respondent testified: “That that would be that I didn’t remember what happened.”

Respondent testified that she could not remember and that the city attorney told her that she could not say “I think it may be this.” She said he told her to just plead the Fifth Amendment so it would not look like she was lying and get herself in trouble.

She did not have any private or union attorney on that date. Respondent stated that she invoked the Fifth Amendment eight or ten times that day. She did not notify the Internal Affairs Bureau (IAB) or her command after the deposition.

At some time in 2007, she was called to go to Corporation Counsel. She was again questioned regarding the 2002 incident. She did not invoke her Fifth Amendment privilege at that time. She explained that this was because she had a different city attorney, a woman, who told her that if she did not remember she should just say that she did not remember.

She first learned that she had to notify IAB about taking the Fifth Amendment in 2010, when she was called for an official Department interview.

Respondent stated that she is currently on sick leave and has been since 2009.² She testified that she has been “surveyed off the job.” She explained that, after reviewing her MRIs and other test results, she was told that she could never go back to full duty and that she must be separated from the Department with an ordinary disability (the disciplinary file indicates that Respondent signed a waiver allowing this disciplinary action to proceed prior to her retirement).

² Respondent initially testified that she was full duty when she was interviewed by IAB in 2010.

The reason for this, Respondent testified, is that in 2010 she was diagnosed with

[REDACTED]³

Respondent explained that as a result of the illness: "I have trouble walking, talking. If there is a room full of people, I can't concentrate on what one person might say to me, if someone else is talking. I can't remember what they say. It's--."

Respondent was never called back on the civil case after the second deposition. She was not part of any settlement agreement and she did not know if she was named as a party to the case.⁴ She had not been served with papers in the civil case and she did not have to pay any money towards a settlement. She had been ordered to appear for the deposition by the Appearance Control Unit at her command.

On cross-examination, Respondent said she believed that when she was assigned to the 63 Precinct they had been served with papers for her and she stated that she did not remember nor did she read any papers. She did agree that she was aware at the time that there may have been a civil lawsuit involving civilian complainants. She did not have any discussion with any city attorney at that time. She did not receive any other information about the case until she went for the deposition in 2006.

Respondent stated that when she got to the deposition, the attorney only initially told her was that it related to an arrest back in 2002. She said that the city attorney did not tell her about the Fifth Amendment until the middle of the deposition. She stated: "I

³

[REDACTED]. Much of the discussion that took place during this proceeding dealt with a claim by Respondent's counsel that the penalty proposed by the Department Advocate would be particularly harsh on this Respondent. The Advocate recommended a penalty of 10 vacation days and 20 suspension days to be served. Counsel represented that it was his understanding that during that period of suspension, Respondent would lose her medical and drug coverage. He noted that her medication costs \$1500 a shot at a time when she would be without pay. The Advocate represented that there would be some coverage. The issue is unresolved and, given the recommendation, is not relevant. On the issue of Respondent's health, the Court notes that it observed that Respondent walks with a substantial limp.

⁴ The attorneys agreed that she had been named as one of the defendants in the civil case.

couldn't remember I was getting mad that I couldn't remember what I was saying. He called it off, we went outside, and he said I think it would be best if you would assert your Fifth Amendment because if you don't remember, you don't remember, just assert your Fifth Amendment and that's what I did."

Respondent did not remember if, prior to asserting the Fifth Amendment, she acknowledged that she had incorrectly filled out some paperwork in relation to the arrest.⁵ She did not think it was necessary to notify anyone in the Department at the time about her asserting the Fifth Amendment. She explained:

At the time I was only asserting my Fifth Amendment is because I couldn't remember. I wasn't lying about anything. I wasn't protecting anyone. I wasn't doing anything of that sort. He made me believe that I was asserting my Fifth Amendment because I didn't remember. I didn't realize that it had anything to do with me lying or hiding something or it had nothing at all to do with that. There was nothing I was trying to hide. I thought it was just because I didn't remember. That, that was - - okay, now just say you plead the Fifth Amendment.

Respondent acknowledged that she did answer some questions with the statement "I don't remember." She explained:

I'm sure, where I started to say I think I remember - - like I was trying so hard to remember every detail from four years ago and I couldn't. And I was like, I think I pulled into the parking lot. Or which way were you facing; I think I was facing that way. I - - I remember going into the parking lot. It just was sounded very jumbled and it just - - it wasn't making sense and he said just plead the Fifth Amendment. I'm telling you - - you know, that's what the lawyer advised me to do.

⁵ A review of the transcript of the deposition of December 1, 2006 (DX 1) indicates that the only error Respondent acknowledged in her paperwork related to a failing to note in her memo book when she arrived at the stationhouse from the scene of the arrest of Mr. Koutsivitis.

Respondent acknowledged that during the deposition she had difficulty remembering events. Respondent agreed that she took the Fifth Amendment because she had difficulty remembering events.

On questioning by the Court, Respondent indicated that she did not have her own attorney present, nor did she have a union representative such as a delegate or trustee present. Further, she indicated that there was no one from the Department present with her.

On re-cross examination, Respondent said that she did not meet with the city attorney prior to the deposition to go over potential testimony nor did anyone get in touch with her to prepare her for the deposition in advance.

FINDINGS AND ANALYSIS

The Department, through the transcript, established what it alleged: that is, that Respondent asserted the Fifth Amendment during a deposition. After a careful examination of that transcript and the charged section of the Patrol Guide, a more comprehensive analysis is required to make a proper determination in this case.

Respondent was appointed to the Department on March 1, 2000. On December 13, 2002, she was a patrol officer in the 63 Precinct. On that day, she was assigned an arrest. A lawsuit was brought by a person or persons arrested.

In June 2004, Respondent was transferred to Staten Island Court Section. On December 1, 2006, while she was assigned there, she was ordered to report to a deposition in connection with the arrest that had occurred four years earlier.

As noted, during that deposition, Respondent invoked her Fifth Amendment privilege against self-incrimination a number of times.

At some point in the year 2010, after the civil lawsuit was settled, the Department learned of the fact that Respondent had invoked her Fifth Amendment privilege and the instant charge was brought against her.

Respondent has asserted that this disciplinary procedure is barred by the statute of limitations as the offense occurred more than 18 months before the service of charges. The Department claims that duty to report was ongoing and charges Respondent with a continuing offense which it claims ended in 2010 and perceives no statute of limitations issue.

This ordinarily would be a threshold issue; however, a full hearing has been held on the substantive issues of this case and they merit discussion.

Respondent is charged in one specification with failing to notify IAB of her assertion of her privilege against self-incrimination. The specification cites Patrol Guide Section 207-21, pages 1-2, paragraphs 1-3, entitled "Complaints Allegations of Corruption and Serious Misconduct Against Members of the Service."

This Patrol Guide section requires members of the service to report allegations of corruption or serious misconduct against members of the service, including themselves, to IAB. There is no mention of the Fifth Amendment in this Patrol Guide section; however, a properly invoked assertion of Fifth Amendment privileges would ordinarily mean that the person invoking those privileges has committed a crime or at least has a reasonable basis to believe that he or she will be charged with a crime. As a result,

ordinarily, an assertion of the Fifth Amendment privilege by a member of the service would require self-reporting as required by this Patrol Guide section.

The problem here is that this is not an ordinary case and the Fifth Amendment was improperly invoked.

Respondent was ordered to the deposition on December 1, 2006. Respondent testified that no one met with her prior to the deposition to prepare her for a situation in which she was to be questioned by an attorney for the plaintiff, on the record, about events that occurred four years earlier. She testified that at some point during the proceeding, the attorney for the city called her outside of the deposition room. He told her that if she did not remember something she could assert her Fifth Amendment rights, and thereafter she did just that. Respondent asserted that she was not hiding some wrongdoing but merely doing what the attorney had told her.

Respondent's testimony on these issues is credible. This finding of credibility is based not only on Respondent's unchallenged testimony, but by a review of the transcript of the deposition.

Reading that transcript, it is clear that at some point during the deposition Respondent seems to have become confused and inconsistent in her answers.⁶ The attorney for the city asked for a recess during which the presiding judge was called.⁷ The city attorney asked for a postponement of the deposition, which was denied. During the

⁶ Respondent has testified that she was diagnosed with [REDACTED] shortly after this deposition. It is possible that she was suffering the effects of this disease, one of whose symptoms is "mild cognitive and memory difficulties" at the time of the deposition (see website of the [REDACTED]), but there is no way of knowing.

Judges are normally not present for EBTs. However, because litigation was pending the case apparently had been assigned to a judge. The record is not entirely clear but it appears that the judge was called on a speaker phone. It also appears that there was an off-the-record conversation followed by the judge's on-the-record directive.

conversation with the judge, the city attorney cited what he believed might be ethical issues and the judge told him that he did not have to ask Respondent any questions.

Shortly after the deposition resumed, the city attorney made a statement in which he said that he had advised Respondent that she had a right to exercise her rights under the Fifth Amendment, something she had not done up to that point in the proceeding. After that, Respondent answered a few questions and then began to assert the Fifth Amendment on just about every question asked. The city attorney declined to order her to answer questions even when it was clear the Fifth Amendment had absolutely no applicability.

It should be noted at this juncture that Respondent did not have her own attorney. Her interests were represented by the city attorney. It is clear from the record that she was following the advice not just of an attorney but of an attorney provided for her by her employer, the City of New York, who, unbeknownst to her, had walked away from taking any responsibility for her.

Because no further information could be obtained, the attorneys in the civil case agreed to adjourn the deposition. On March 29, 2007, the deposition of Respondent was reopened. The Department originally charged Respondent with exercising her privileges on that second date as well; however, on the day of this trial, after an examination of that part of the transcript, the Department conceded that Respondent did not exercise her Fifth Amendment privileges on March 29, 2007, and that date was stricken from the charge.

This is significant as a reading of the transcript shows that the entire reason the deposition was resumed related to this issue. On March 29, 2008, Respondent was represented by a different, and clearly more capable, city attorney. That attorney

announced at the outset of the proceeding that Respondent had mistakenly asserted the Fifth Amendment previously and that she was now prepared to answer any and all questions. Respondent did just that and the proceeding went smoothly until opposing counsel had exhausted all of his questions.

There are several conclusions that can be drawn from this. The first is that this time Respondent had been prepared to deal with a deposition. It should be noted that it is appropriate and ethical for an attorney to prepare a witness for a proceeding by explaining how the proceeding will work and what the subject matter will be. A witness can properly be instructed to explain that he or she does not remember something as opposed to guessing or giving a qualified answer. Among other things, this kind of preparation puts a witness at ease.

Although the first city attorney may have reviewed some documents with her, it is fairly obvious, reading the transcript of these proceedings, that Respondent was not prepared the first time.

The second thing that is obvious is that Respondent had no wrongdoing to hide. She agreed to answer any and all questions on the second occasion and did not invoke her Fifth Amendment privilege.

The next conclusion that can be drawn from the second deposition is that the attorney on the first deposition made a very serious error. The Fifth Amendment is not a means by which someone can avoid answering questions which make them uncomfortable. Nor is it a means of rescuing a flustered witness who was not prepared. It is very specifically geared toward protecting someone from having to make a forced confession regarding a crime he or she may have committed. Thus, if a witness is asked

a question which would make him or her civilly liable, but not criminally liable, that witness can be compelled to answer. Similarly, if prosecution of a crime is barred because, for instance, immunity has been granted such as in a grand jury, the testimony can likewise be compelled.

In this case, more than four years had passed since the events in question. That means that any misdemeanor prosecution was barred by the statute of limitations (see CPL 30.10) and the possibility of any felony prosecution was close to being time barred as well (most felonies have a five-year statute of limitations).

An examination of the questions to which Respondent asserted the Fifth Amendment make crystal clear that that privilege was being improperly utilized and the city attorney who advised her to use the Fifth Amendment made no effort to deal with the issue. Examining the transcript, that exact discussion occurred at the deposition just after the first time Respondent asserted the Fifth Amendment:

Question: (referring to the on-line booking sheet)
And besides the supervisor's signature at the bottom, did anyone else write anything on this form besides you?

Answer: My lawyer has advised me that I could assess⁸ my fifth amendment, and I'm going to do that.

Question: Just take a look at this officer. Is that the on-line booking sheet worksheet that you referred to earlier?

Answer: I assess my fifth amendment.

Question: On that question?

Answer: Yes.

Question: I instruct you to answer it, there's no likelihood of incrimination on that question.

City Attorney: I've advised and I can't do anything else. I don't know what else I can do. (DX 1, p. 88).

This exchange also underscores the fact that Respondent was not covering up some criminal action on her part. Among the questions she refused to answer were things

⁸ As in the transcript.

such as whether there were boxes on the form that she had to check off or whether she had testified in the grand jury.

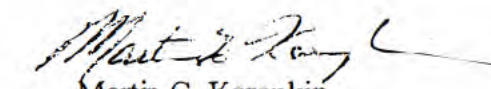
The transcript also provides support for something else Respondent stated. She claimed that the first city attorney told her that she should assert the Fifth Amendment if she was not certain about a fact. That of course would be terrible and incorrect legal advice, but it is not inconsistent with what occurred. Certainly as can be seen from the quoted portion of the transcript above, that attorney made no effort to explain what it meant to assert the Fifth Amendment; moreover, it appears that he abandoned representing her without advising her of that fact.

As was stated at the outset of this discussion, this is not an ordinary case of the use of the Fifth Amendment. Respondent, on advice of the only counsel she had, one provided by the city, improperly utilized the Fifth Amendment. There is no evidence nor is there any allegation that Respondent committed a crime or engaged in any serious misconduct outside of the fact that she invoked the Fifth Amendment. There was no crime or serious misconduct that Respondent had to report to IAB under the Patrol Guide section charged. Respondent is found Not Guilty on the merits. It is, for that reason, unnecessary to discuss the statute of limitations issue raised by Respondent.

Respectfully submitted,

APPROVED
MAR 15 2012

RAYMOND W. KELLY
POLICE COMMISSIONER


Martin G. Karopkin
Deputy Commissioner - Trials